



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

January 22, 2003

Mr. Brad Norton
Assistant City Attorney
City of Austin
P.O. Box 1546
Austin, Texas 78767-1546

OR2003-0441

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID#175305.

The City of Austin (the "city") received a request for sales tax exemption certificates and the accompanying predominate use studies submitted to Austin Energy since March 1, 2002. The requestor also seeks correspondence since January 1, 2002, between the State Comptroller and the city (or Austin Energy) regarding sales tax exemptions, underpayment of taxes, and the audit or investigation of these issues by the State Comptroller. You claim that the information responsive to the request is excepted from disclosure under sections 552.116 and 552.133 of the Government Code. We have considered your arguments and reviewed the representative sample of information submitted by the city.¹

Section 552.116 provides as follows:

- (a) An audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education as defined by Section 61.003, Education Code, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [required public disclosure] by this section.

¹You indicate that some of the submitted information consists of representative samples. We assume that the "representative sample" of records submitted to this office is truly representative of the requested records at issue as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Section 552.116 is intended to protect the auditor's interests, which in this instance is the comptroller. The submitted documents include records of the city (the auditee) that have been reviewed by the auditor and are maintained by the city. As the auditee, the city cannot assert section 552.116 in order to protect its own interest in withholding the information. As such, section 552.116 is inapplicable and does not protect these documents from disclosure.

We will now address your argument under section 552.133 of the Government Code. Section 552.133 excepts from disclosure a public power utility's information related to a competitive matter. The exception defines "competitive matter" as a matter the public power utility governing body in good faith determines by vote to be related to the public power utility's competitive activity. The governing body must also, in like manner, determine that the release of the information would give an advantage to competitors or prospective competitors. Section 552.133(a)(3) lists thirteen categories of information that may not be deemed competitive matters. The attorney general may conclude that section 552.133 is inapplicable to the requested information only if, based on the information provided, the attorney general determines the public power utility governing body has not acted in good faith in determining that the issue, matter, or activity is a competitive matter or that the information requested is not reasonably related to a competitive matter. Gov't Code § 552.133(c). Further, section 552.133(b) provides:

Information or records are excepted from the requirements of Section 552.021 if the information or records are reasonably related to a competitive matter, as defined in this section. Excepted information or records include the text of any resolution of the public power utility governing body determining which issues, activities, or matters constitute competitive matters. *Information or records of a municipally owned utility that are reasonably related to a competitive matter are not subject to disclosure under this chapter*, whether or not, under the Utilities Code, the municipally owned utility has adopted customer choice or serves in a multiply certificated service area. This section does not limit the right of a

public power utility governing body to withhold from disclosure information deemed to be within the scope of any other exception provided for in this chapter, subject to the provisions of this chapter.

Gov't Code § 552.133(b) (emphasis added).

The Austin City Council (the "city council"), the governing body for Austin Energy, passed a resolution by vote pursuant to section 552.133 in which it delineated a list of competitive matters, which, if disclosed, would provide an advantage to competitors. The resolution includes customer related information in the list of competitive matters. You have provided this office with a copy of the resolution. The city asserts that the submitted information contains customer information. Customer information is not among the thirteen categories of information expressly exempted from the definition of competitive matter, and we have no evidence the city failed to act in good faith. Based on our review of your arguments and the resolution, we agree that the city must withhold customer related information pertaining to electric services under section 552.133, including the information at issue in Open Records Letter No. 2001-5582 (2001), which serves as a previous determination for customer information.

We also note that the submitted documents contain information protected by section 552.136 of the Government Code. Section 552.136 makes certain access device numbers confidential and provides in pertinent part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value;
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. Accordingly, the city must withhold the account numbers that we have marked pursuant to section 552.136 of the Government Code.

In summary, the city must withhold customer information pertaining to electric services under section 552.133 as well as the account numbers that we have marked under section 552.136. The city must release the remaining information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "Heather Ross". The signature is written in a cursive, flowing style.

Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/sdk

Ref: ID# 175305

Enc: Submitted documents

c: Mr. W.H. Morea, III
Tri WestSource, Inc.
6112 Anemone Cove
Austin, Texas 78759
(w/o enclosures)